



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

PETITION NO. E003 OF 2019.

NJAMA WAMBUGU.....PETITIONER/APPLICANT

VERSUS

WINFRIDA WANJIKU NGUMI.....RESPONDENT/RESPONDENT

AND

SPACE STYLE LIMITED.....NOMINAL RESPONDENT

RULING

Background

1. Through the petition dated 10th December 2019, the petitioner herein, **Njama Wambugu**, who describes himself as the founder and Group Executive Director of the Nominal Respondent, sued the Respondent and Nominal Respondent (hereinafter “**the Company**”) seeking the following orders.

- a) A permanent injunction restraining Winfrida Wanjiku Ngumi and Space and Style Limited from removing, subverting, obstructing, prejudicing or in any other manner whatsoever interfering with the position and standing of Njama Wambugu as Founder and Executive Director in the Board of Directors of Space and Style Limited.*
- b) A permanent injunction restraining Winfrida Wanjiku Ngumi and Space and Style Limited from terminating, subverting, obstructing, impeding or in any other manner whatsoever interfering with the employment and remuneration of Njama Wambugu as Executive Director and Employee Number 001 in Space and Style Limited.*
- c) A declaration that pursuant to article 13 of the Articles of Association of Space and Style Limited, only persons holding share(s) in Space and Style Limited are eligible to hold the position of Director in the Board of Directors Space and Style Limited.*
- d) An order of rectification of the register of members of the Nominal respondent to conform with article 13 of the Articles of Association of Space and Style Limited to include only directors holding at least one share in the Nominal Respondent.*
- e) An order of mandatory injunction directing Winfrida Wanjiku Ngumi to issue a notice of rectification of the register of members of the Nominal respondent under the provisions of Section 103(4) of the Companies Act to include only directors holding at least one share in the Nominal respondent.*
- f) A declaration that the following conducts of Winfrida Wanjiku Ngumi are oppressive to the interests and authority of Njama Wambugu in exercising his role as founder, shareholder and Executive Director Directors Space and Style Limited within the meaning of Section 780(1) of the Companies Act No. 17 of 2018:
 - i. Unilateral instructions issued by Winfrida Wanjiku Ngumi on or about 7th November, 2019 seeking incremental facility from NCBA Bank in the name of Space and Style Limited approximately in the sum of Kes 140,000.000 without notice, reference or consent of Njama Wambugu and is disregard that Njama Wambugu had equal 100% guaranteed the facility and had taken out indemnities to the facility thus deserved consultation and written approval before unilaterally seeking to obtain incremental facility that would further commit Njama Wambugu.**

ii. Attempted unilateral cancellation by Winfrida Wanjiku Ngumi, vide her letter dated 4th November, 2019 addressed to Equity Bank of Kenya Ltd, of two credit cards, namely Visa Gold Card and American Express Card issued by the bank in favour of Njama Wambugu that he had used for over 5 years, without notice to or consent of Njama Wambugu with a clear intention to deny him a benefit that he had so enjoyed as a director for over 5 years, to stifle his ability to optimally execute his role as executive director of Space and Style Limited and embarrass, humiliate, frustrate and harass Njama Wambugu;

iii. Unilateral refusal to renew directors' liability insurance cover with NCBA Bank previously enjoyed by Njama Wambugu, with a clear intention to adversely affect his health, well being, embarrass him in the eyes of the bank and subordinate staff of Space and Style Limited and expose him to possible risk of loss to his lifetime investments as Winfrida Wanjiku Ngumi knew that at all material times to date, Njama Wambugu had given personal guarantees to NCBA Bank over facilities extended to Space and Style Limited amounting to Kshs 353,000,000.

g) A declaration that Winfrida Wanjiku Ngumi acted fraudulently in signing and sending the following extracts of minutes of Space and Style Limited:

i. Extract of the minutes of the Board of Directors Space and Style Limited held on 23rd August, 2019 dated on even date signed by Winfrida Wanjiku Ngumi and sent to Registrar of Companies, to the extent that:

a. The extracts are not true records of the minutes of the meeting of 23rd August, 2019 and did not reflect Njama Wambugu's rejection of the process on grounds of illegality and fraud;

b. Winfrida Wanjiku Ngumi prepared a new document purported to be extract of the resolution of 23rd August, 2019 signed only by Winfrida Wanjiku Ngumi and a third party and which did not disclose Njama Wambugu's rejection of the process on grounds of illegality and fraud.

ii. Extract of the minutes of the Board of Directors of Space and Style Limited held on 22nd October, 2019 dated on even date, signed by Winfrida Wanjiku Ngumi and sent to Equity Bank Limited, to the extent that:

a. The extracts are not true records of the minutes of the meeting of 22nd October, 2019 without disclosure that Njama Wambugu had expressly stamped on the face of the resolution that the process was unlawful and rejected:

b. Winfrida Wanjiku Ngumi prepared a new document purported to be extract of the resolutions of 22nd October 2019 signed only by Winfrida Wanjiku Ngumi and a third party and which did not disclose Njama Wambugu had expressly stamped on the face of the resolution that the process was unlawful and rejected.

h) An order of this Honourable court quashing:

i. Extract of the minutes of the Board of Directors of Space and Style Limited held on 22nd October, 2019 dated on even date, signed by Winfrida Wanjiku Ngumi and sent to Registrar of Companies;

ii. Extract of the minutes of the Board of Directors of Space and Style Limited held on 22nd October, 2019 dated on even date, signed by Winfrida Wanjiku Ngumi and sent to Equity Bank Limited.

iii. Instruction issued on or about 7th November 2019 issued by Winfrida Wanjiku Ngumi seeking incremental facility from NCBA Bank in the name of Space and Style Limited approximately in the sum of Kes 140,000,000.

iv. Letter dated 4th November, 2019 signed by Winfrida Wanjiku Ngumi addressed to Equity Bank of Kenya Ltd, seeking inter alia, cancellation of two credit cards, namely Visa Gold Card and American Express Card issued by the bank in favour of Njama Wambugu; and

v. Instruction by Winfrida Wanjiku Ngumi dated to NCBA Bank not to renew directors' liability insurance cover with NCBA Bank previously enjoyed by Njama Wambugu.

i) A declaration that Winfrida Wanjiku Ngumi has conducted affairs of the Space and Style Limited in a manner that is unfairly prejudicial to the interests and authority of Njama Wambugu in exercising his role as founder and Executive Director of Space and Style Limited.

j) A permanent injunction issues retraining Winfrida Wanjiku Ngumi, either by herself or on her direction to staff of Space and Style Limited or on her direction to third parties dealing with Space and Style Limited from:

i. Withholding any information that concerns or is related to the affairs and operations of Space and Style Limited;

ii. Insubordinating Njama Wambugu;

iii. Recruiting any management staff of Space and Style Limited without the consent of Njama Wambugu; and

iv. *Appointing suppliers of Space and Style Limited without the consent of Njama Wambugu;*

v. *Appointing suppliers of Space and Style Limited without the consent of Njama Wambugu.*

k) *A permanent injunction issues restraining Winfrida Wanjiku Ngumi, either by herself or by any person claiming interest in Space and Style Limited through Winfrida Wanjiku Ngumi, from opening new bank accounts (s) in the name of Space and Style Limited or closing bank accounts in the name of Space and Style Limited without written consent of Njama Wambugu.*

l) *A permanent injunction issues restraining Winfrida Wanjiku Ngumi, either by herself or by any person claiming interest in Space and Style Limited through Winfrida Wanjiku Ngumi, from charging, encumbering, selling, leasing, transferring, alienating or interfering with all the moveable properties of Space and Style Limited without the express consent of Njama Wambugu*

m) *A permanent injunction issues restraining Winfrida Wanjiku Ngumi, either by herself or by any person claiming interest in Space and Style Limited through Winfrida Wanjiku Ngumi, from charging, encumbering, selling, leasing, transferring, alienating or interfering with all the moveable properties of Space and Style Limited without the express consent of Njama Wambugu, to wit.*

i. *Karen property LR No. 13459-16;*

ii. *Migaa Plot – B527*

iii. *Karen Plains House – LR No. 25591;*

iv. *Kisambi Plot LR NO. 11407/1170/Juja; and*

v. *Kisumu land LR No. Dago/755 & 3124.*

n) *A permanent injunction issues restraining Winfrida Wanjiku Ngumi either by herself or by any person claiming interest in Space and Style Limited through Winfrida Wanjiku Ngumi, from purchasing, acquiring or borrowing any new moveable or immoveable properties in the name of Space and Style Limited without the express consent of Njama Wambugu.*

o) *A permanent injunction issues restraining Winfrida Wanjiku Ngumi, either by herself or by any person claiming interest in Space and Style Limited through Winfrida Wanjiku Ngumi, from charging, encumbering, selling, leasing, transferring, or interfering with shares, stocks and interests owned by Space and Style Limited in any company, bank and entity without express consent of Njama Wambugu.*

p) *The respondent bears the costs of this petition;*

Application

2. Contemporaneously with the petition, the petitioner also filed an application dated 10th December 2019 seeking the following orders:

1. *Spent*

2. *Spent*

3. *Spent*

4. *Pending hearing and determination of this application, this Honourable court restrains Winfrida Wanjiku Ngumi and Space and Style Limited either by themselves of Board of Directors of Space and Style Limited from removing, subverting, obstructing, prejudicing, discussing any petition for removal of Njama Wambugu from the board of directors of Space and Style Limited or in any other manner whatsoever interfering with the position and standing of Njama Wambugu as Founder and Executive Director in the board of directors of Space and Style Limited or in any manner interfering with shareholding or any interests of Njama Wambugu in Space and Style Limited and its properties.*

5. *Pending hearing and determination of the petition herein, this Honourable court restrains Winfrida Wanjiku Ngumi and Space and Style Limited either by themselves of Board of Directors of Space and Style Limited from terminating, subverting, obstructing, impeding, harassing or in any other manner whatsoever interfering with the employment and remuneration of Njama Wambugu as Executive Director and Employee Number 001 in Space and Style limited.*

6. *All the costs and expenses reasonably incurred in prosecuting this application be borne by the respondent.*

3. The application is brought under Sections 139, 141, 780 and 782 of the Companies Act No. 17 of 2015 (hereinafter “**the Act**”) of oppression and unfair prejudice. The application is supported by the applicants various affidavits and is premised on the grounds that:

1. *The applicant and the respondent are the founders of the Nominal respondent from scratch and have for the past 18 years co-*

managed the Nominal respondent into a successful company that it is today. In a pattern of premeditated and sustained oppressive and unfairly prejudicial behaviours by the respondent against the petitioner.

a. The respondent is frustrating the applicant out of the Board of Directors of the Nominal respondent to her benefit;

b. The respondent is frustrating the applicant out of employment as Executive Director in the Nominal Respondent to her benefit; and

c. The respondent is persistently creating artificial cash flow crisis in the Nominal Respondent in disguised attempt to blackmail the applicant into selling out his shares well aware that the respondent enjoys the preferential right to buy the shares.

2. In her latest attempt to ensure that the applicant absolutely loses control and management of the Nominal Respondent, the Respondent, in an email sent out on the evening of Friday, 6th day of December, 2019 after work followed up another email from the company Secretary of the Nominal Respondent on Monday, 9th day of December, 2019, the respondent scheduled a meeting of the Nominal Respondent for this Friday, 13th December, 2019, barely 4 days away, to remove the applicant from the Board of Directors of the Nominal Respondent.

3. The applicant has attached to this application the petition that the respondent will be lodging to the Nominal Respondent on Friday, 13th December, 2019, which the respondent availed to the applicant only yesterday, Monday, 9th December 2019.

4. The Nominal Respondent has not invited any representations on the petition from the applicant over the petition and the respondent has not given the applicant 21 day notice mandatorily required in Section 141(4) of the Companies Act No. 17 of 2015 in every petition for removal of a director from the Board of Directors of Company.

5. A director cannot be removed from the Board of Directors of a company through four day notice as the Respondent and the Nominal Respondent purports. The director must be given at least 21 day notice from the date the petition is served him to respond to allegations in the petition.

6. The forum for removing a director from the Board of Directors is the general meeting of the company members, not a Board meeting as the respondent and the Nominal Respondent intend to do on Friday, 13th December, 2019.

7. The respondent and the Nominal respondent intend to remove the applicant from the Board of Directors of the Nominal Respondent at a meeting of the Board of Directors of the Nominal Respondent when Section 139(1), 139(2), 141(1) and 141(2) of the Companies Act No. 17 of 2015 and settled law are all clear that a petition to remove a director from company Board of Director can only be discusses at a general meeting of the members of the company.

8. Unless this Honourable court restrains the respondent and the Nominal Respondent from removing the applicant from the Board of Directors of the Nominal Respondent, the applicant risks losing everything in the Nominal Respondent that he has relentlessly toiled for in the last 18 years and given all his youth to, on account of the respondent's sustained greed, oppression and exalted self-interests over those of the Nominal Respondents to deprive the applicant of his company, the Nominal Respondent, which he founded from scratch and built with sweat and blood. The applicant will suffer irreparably.

9. The applicant is not only a signatory to all the bank accounts maintained by the Nominal Respondent, but has also given out his personal guarantees to NIC Bank (NCBA Bank) over facilities that the bank extended to the Nominal Respondent in the sum of Kes 353,000,000 by virtue of his directorship in the Nominal Respondent. Removing the applicant from the Board of Directors of the Nominal Respondent with the consequential loss of control over the running and management of the Nominal Respondent exposes the applicant to monumental loss of all his lifetime investments in the event of default by the Nominal Respondent which is the main aim of the respondent against the applicant through persistent and sustained oppressive and prejudicial conducts against the applicant.

10. The respondent's petition for the removal of the applicant as director in the Nominal is exclusively self-serving to the respondent. The respondent knows she has preferential rights to buy the applicants shares in the Nominal Respondent. The petition is one of the several arm twisting tactics that the respondent is employing to optimally oppress he applicant into sell his shares in the Nominal Respondent as the respondent knows she has the first right to buy the shares and succeed in keeping the Nominal Respondent to herself, which is the respondent's ultimate objective.

4. In his written submissions filed on 21st January 2020, the applicant indicated that he had abandoned prayers 3 and 5 of the application on jurisdictional grounds. He added that he only seeks prayers 2 and 4 on grounds of oppression and unfair prejudice.

5. The applicant submitted that the application meets the threshold set for the granting of the injunctive reliefs sought as was stated in the case of *Giella v Cassman Brown & Company Ltd* [1973] EA 358.

6. On prima facie case, counsel for the applicant cited the case of *John Mututi Njaga v Graham Alexander Walsh & 3 Others* [2017] eKLR wherein the court held that an applicant establishes a prima facie case if he specifies the alleged oppressive or prejudicial conduct and substantiates them.

7. It was submitted that the applicant had overwhelmingly shown that the respondent had relied on her contested majority shareholding in the company to act and threaten to act oppressively and unfairly against the minority applicant, thereby warranting the granting of the injunctive relief sought.

8. The applicant faulted the respondent and the Company for introducing and rehashing substantive issues that had previously been determined in **Nairobi HCCC Case No. 194 of 2018** and appealed against in **Nairobi CA Application No. 54 of 2019** (hereinafter “**the Earlier case**”) which issues, he states, are distinct diversionary and irrelevant to the issues raised in the instant petition.

9. It was submitted that the substantive issues in the Earlier Case and the consequential arbitration before the sole arbitrator, **Mr. John Ohaga**, should not be entertained before this court as they will be determined in those fora. It was further submitted that the respondent had used her contested majority shareholding of 51.697% voting power as against the applicant’s 43.303% and her position as Managing Director in the Company to assemble a Board of “**yes men**” to give a veneer of legality to her oppressive and unfairly prejudicial conduct against him in the manner in which she conducts the affairs of the nominal respondent.

10. For this argument, counsel cited the English decision in **HR Harmer Ltd [1958] 3 ALL ER 689** and submitted that “conduct which is technically legal and correct may nevertheless be oppressive if exerted by a person with predominating voting power which was employed for his own advantage to the detriment of a helpless minority.

11. The applicant outlined the unfairly prejudicial and oppressive conduct of the respondent as follows:

a) Unilateral incremental of the facility with NCBA Bank to oppress the applicant.

b) Unilateral refusal to renew Director’s liability Insurance Cover to oppress the applicant.

c) Setting up the applicant for insubordination by staff and suppliers through withholding of information and public ridicule.

d) Illegal and unsubstantiated bases for removal of the applicant from the Board of Directors of the company.

e) Lack of substance on grounds for removal from the Board of Director of the company.

f) Intended erosion of the applicant’s equity through artificial cash call as a form of oppression of the applicant.

12. On irreparable loss, the applicant submitted that he has continuing personal guarantee to the sum of Kshs 353,000,000 which he issued to NCBA Bank over maximum overdraft facilities of kshs 310,276.189 that the bank extended to the company which guarantee gives NCBA Bank the right of lien over all assets and securities of the applicant.

13. It was therefore submitted that his illegal removal from the Board of Directors (BOD) will unfairly remove him from the control of the affairs of the Company while continuing to commit all his personal assets thereby exposing him to the risk of losing all his lifetime investments to NCBA Bank in the event of default by the Company to which he will then have no control.

14. It was submitted that unless the prayer No. 4 is allowed, the respondent and the Company will proceed with the artificial cash call and succeed in eroding the applicant’s equity in the company while relying on an outdated valuation report that does not reflect the true net worth of the company and consequently arbitrarily deprive him of his property in breach of Article 40 of the Constitution of Kenya. It was further submitted that the balance of convenience tilts in favour of granting the injunctive relief sought.

The respondent’s case.

15. The respondent opposed the application through her replying affidavit sworn on 9th January 2020 wherein she takes issue with the grounds relied upon by the applicant for seeking the certification of the application as urgent and for seeking the restraining orders. She denies the allegation that the meeting held on 13th December 2019 deliberated on the removal of the applicant. She however confirms that a petition for the plaintiff’s removal was presented to the Board of Directors for its consideration.

16. She concedes that while it is true that the plaintiff is her co-shareholder/Director of the Company, the Company was initially a business owned and registered solely by her, having already established a business distribution of Decra Roofing tiles. She denies the allegation that the applicant is the Founder and the Executive Director of the Company and states that such titles do not exist in the company’s organization structure.

17. She confirms that the Company’s shareholding changed in 2015 through her consent and that of the applicant when they each sold 2,500 of their ordinary shares to Decamis Limited and that the applicant did not object to the Company’s new shareholding as at the time of the filing of the Annual Returns.

18. She avers that the issue regarding 4,197 ordinary shares of the company are the subject of the Earlier Case and states that the facts, findings and chronology of issues arising therefrom are relevant to the determination of the instant application and petition.

19. She explains the circumstances under which the applicant transferred 4,197 ordinary shares to her and the subsequent filing of the Earlier Case. She states that the applicant’s allegations of oppressive and prejudicial behavior have not been substantiated and are intended to sustain a suit and procure adverse orders against her and the Company so as to frustrate the operations of the Company.

20. She states that her presentation of a petition to the Board of Directors for the removal of the applicant from the Company’s Board of Directors was lawful and cannot be termed as oppressive or prejudicial. She avers that the applicant’s statement on alleged incidents of oppression are untrue. She states that the applicant does not play the role of the Executive Director or employee of the company and maintains that the applicant only receives an ex-gratia monthly payment of Kshs 750,000 for his role in signing company cheques and other

documents.

21. She confirms that the company has a loan facility with NCBA Bank but denies the claim that the said loan was unilaterally increased by her or that such increment was to the detriment of the applicant. She states that the decision to increase the loan facility to the tune of KShs 140,000,000 was made by the Company's Board of Directors despite numerous efforts by the applicant to frustrate such increment.

22. She further states that the decision to open other bank accounts was made by the Company's Board of Directors and not by her unilaterally as suggested by the applicant. She denies the claim that she maliciously refused to take out a Director's Liability Insurance Cover for the applicant and states that decision not to renew the said cover, including her own, was due to fact that the Company could not afford the huge insurance premium due to cash flow challenges. She adds that it is incredulous that the applicant who has stifled all the company's attempts to restructure its credit facilities and refinance its operations, is crying foul at the Company's failure to renew the Director Liability Insurance Cover.

23. She denies ever instructing any of the Nominal Respondent's members of staff to withhold critical information concerning the affairs and operations of the Company from the applicant and reiterates that the applicant is not concerned with the day to day operations of the company. She denies being a shareholder or director of the applicant's company Roser Roofing (EA) Limited and states the said Roser that company was incorporated by the applicant for his own benefit.

24. On the issues of "Artificial" cash flow crisis leading to the need for a cash call, she states that the cash flow crisis has been the subject of many board meetings the determination of which rests with the Board of Directors and the Company's finance department.

25. She faults the applicant for consistently opposing and undermining the Company board's activities and resolutions and contends that such opposition is evident in the cases that he has filed in court and his objection to the Company's intended rights issue. She takes issue with the applicant's reference to the Company as 'his' company and reiterates that a company is a separate legal entity whose interest ought to be shielded from the shareholding dispute between her and the applicant.

26. She accuses the applicant of material non-disclosure of the proceedings in the earlier case at the time he filed for and obtained the ex parte orders. She states that the applicant sought an application at the Court of Appeal seeking to restrain her and the Company's board from running the latter's affairs including discussing his removal from the Board of the Company which is a material fact to the application before this court. She urges this court to stay this matter pending the hearing of the matter pending before the Court of Appeal.

27. She further states that the Court of Appeal has already stayed various orders restraining the Respondent and the Directors of the Company from exercising their duties and rights in running the affairs of the company. She adds that following the ruling by the Court of Appeal rendered on 19th July 2019, the applicant has engaged in various acts of sabotage geared towards frustrating the implementation of the said ruling and that arising from those acts, contempt of court proceedings have been initiated against the applicant for acts of sabotage. It is the Respondent's case that these instant proceedings are intended to ensure that the contempt of court proceedings are not heard on their merits.

28. She states that the applicant is out to frustrate the directors of the Company and shareholders from running the company so as to cripple all its operations to the detriment of all its stakeholders including staff, financiers, suppliers, creditors and the Government of Kenya.

29. At the hearing of the application **Mr. Chege** learned counsel for the Respondent reiterated the averments made by the Respondent in the replying affidavit and highlighted the issues for determination to be as follows:

i. Whether the petition and by extensions the instant Notice of Motion application meet the conditions for filing a petition under Section 780 of the Companies Act, 2015 to warrant grant of the interim orders?

ii. Whether the pleadings, the facts and findings in Nairobi High Court 194 of 2018 Njama Wambugu –vs- Space and Style Limited & 5 Others and Court of Appeal Nairobi Civil Application No. NAI 54 of 2019 (UR 60/19) are relevant to the instant petition?

30. It was submitted that both the instant petition and the application do not fall under the purview of Section 780 of the Act as the said section requires an applicant to not only demonstrate the incidents of oppression against the minority shareholders of the company but must state how the incidences complained of were unfairly prejudicial to his interest as a member of the company as opposed to any other interests he possesses. For this argument counsel cited the case of *Scottish Cooperative Wholesale Society Ltd v Meyer & Another* [1958] 3 ALL ER at pg 69.

31. It was submitted that both the petition and application do not substantiate any of the alleged incidents of oppression and unfair prejudice. It was also submitted that the applicant is guilty of material non-disclosure of the proceedings in the Earlier Case and the Court of Appeal case which have a bearing on the instant proceedings and is therefore not entitled to the injunctive orders sought.

32. Counsel submitted that a careful examination of the alleged incidents of oppression and unfair prejudice emanate from the applicant's own dishonesty in his dealings with the company as a shareholder, thereby disentitling him to the orders sought. For this argument counsel cited the decision in *Re Bellador Silk Ltd* [1965] A 11 ER wherein it was held that:

"the presentation of the petition in order to bring pressure to bear to achieve a collateral purpose was an abuse of the process of court."

33. It was submitted that the application does not satisfy the conditions set for the granting of orders of injunction as were articulated in the *Giella case* (supra).

34. It was further submitted that the applicant is not candid in his dealings with the respondent was evident when upon filing the petition, he backtracked and conceded that he was ready to support the Board of Directors to raise funds through the increment of the loan facility.

35. Counsel argued that the applicant should not be allowed to abuse the court process in order to run the company through courts.

The Nominal Respondent's case.

36. The Nominal Respondent/Company opposed the application through the replying affidavit and further affidavit of its Board of Directors Chairman **Mr. David Opiyo Otieno** sworn on 3rd and 10th January respectively.

37. He avers that applicant and the respondent are the initial shareholders and Directors of the Company but that the respondent is the Managing Director and Chief Executive Officer of the Company. He states that the Company was incorporated in April 2002 but that Decamis Limited later acquired shares in the Company.

38. He states that besides being a Director and Shareholder in the Company, the applicant is also the Managing Director and majority shareholder in **Roser Roofing E.A. Ltd**, a competitor of the Company. He attached a copy of CR12 dated 11th December 2019 to the replying affidavit as annexure DOO2.”

39. He states that the orders issued by this court on 16th December 2019 are extremely prejudicial to the Company and observes that while the Company has been cited in the case as a Nominal Respondent, the Company should be the main respondent herein given the subject matter of the suit and the orders sought against the Company. He highlighted the substantive matters in the suit that affect the Company directly to be as follows:-

i. It is the Company's Board of Directors or AGM/EGM of shareholders- as the lawful organs of the Company – rather than Winfrida Wanjiku Ngumi that may or may not resolve or take steps to remove the petitioner as a director of the Company.

ii. The petitioner seeks to stop the Company's Board rather than Winfrida Wanjiku Ngumi from changing its bank mandates, opening new accounts or closing existing accounts. As a matter of law and fact Winfrida Wanjiku Ngumi has no power by herself to act in connection with the Company's bank accounts.

iii. The Company rather than Winfrida Wanjiku Ngumi, is the registered owner of the properties that the petitioner seeks a permanent injunction to restrain it from charging, selling or leasing. Again Winfrida Wanjiku Ngumi has no such power in respect of the Company's properties.

iv. The petitioner seeks to bar the Company from purchasing, acquiring or borrowing any new moveable or immovable properties without his express consent. In law the Company has an independent and separate power and right- acting through its board of directors – to purchase or acquire properties and it does not require the personal consent of either Winfrida Wanjiku Ngumi or Njama Wambugu to do so.

v. The petitioner seeks to quash the minute, letters and instructions of the Company that he wrongly and mischievously attributes to Winfrida Wanjiku Ngumi whose role in the same stems from her position as the Company's Managing Director and Chief Executive Officer.

vi. The purported acts of oppression by Winfrida Wanjiku Ngumi set out in prayer (f) of the petition were discharged or authorized by the Company.

40. He therefore states that the Company is aggrieved because the petitioner has portrayed the respondent as the villain engaging in pernicious and unlawful conduct against him in order to obtain unwarranted orders against the Company.

41. He further avers that the Respondent and the Applicant are currently engaged in a separate legal dispute over the sale of all the applicant's shares to the Respondent which is the subject of the earlier suit in which the applicant obtained this orders to refer their dispute to arbitration and to restrain the respondent from holding out herself as the majority shareholder pending the arbitration.

42. He states that this courts said orders were however overturned by the Court of Appeal in its ruling delivered on 19th July 2019 wherein the following orders were made:

i. The referral of the dispute in Nairobi High Court Civil Case No. 194 of 2018 Njama Wambugu vs. Space and Style Ltd & 5 Others was stayed pending hearing and determination of the appeal aforementioned.

ii. The order restraining the Company and Ms. Ngumi from changing the bank operating mandates was stayed pending hearing and determination of the appeal aforementioned.

iii. The order restraining the Company and Ms. Ngumi to hold herself out as the Company's majority shareholder were stayed pending the hearing and determination of the appeal aforementioned.

43. He avers that the real objective of the instant petition and application is to defeat, compromise and negate aforesaid orders of the Court of Appeal, more so, considering that the petition was filed barely a week after the Court of Appeal certified as urgent, an application to commit the applicant to prison for contempt of the orders made on 19th July 2019.

44. The Company's deponent contends that the instant petition is a culmination of the various unlawful conduct, actions and schemes by the applicant to circumvent the ruling of the Court of Appeal and that in the circumstances of this case, the applicant is not entitled to the discretionary and equitable orders of this court.

45. He faults the applicant for failing to disclose that he (applicant) filed an application before the Court of Appeal on December 2019 seeking to review and/or set aside the Ruling of 19th July 2019. He further states that at the center of this case are various resolutions and proposed actions/decisions by the Company's Board or EGM that the applicant is determined to frustrate, scuttle or otherwise defeat in his systematic scheme to bring down the Company, the very actions that the Court of Appeal sought to stop in the ruling of 19th July 2019.

46. It is the Nominal Respondent's case that the interim orders granted have the effect to counter -manding and contradicting the order of the Court of Appeal issued in the ruling of 19th July 2019. The Company's deponent also swore a further replying affidavit dated 10th January 2020 in response to the applicant's supplementary affidavit sworn on 16th December 2019. He deposes that the issue regarding shares held by Decamis Ltd in the company is not the subject of any pending litigation.

47. He reiterates the contents of his replying affidavit and accuses the applicant of negating and impeding the implementation of the Ruling by the Court of Appeal. He further states that following the ruling by the Court of Appeal, the applicant wrote letters to the Company's bankers cautioning them against acting on the resolutions of the Company's board and that in addition to the said letters to the banks, the applicant also published an advertisement in the Daily Nation Newspaper of 25th October 2019 to warn the Company's partners, bankers, customers stakeholders and the general public against dealing with the Company. He states that as a result of the applicant's actions, he received a petition from two stakeholders of the Company seeking the removal of the applicant from the Company's Board thereby prompting him to call for a special meeting of the said board that was scheduled for 13th December 2019.

48. At the hearing of the application **Mr. Kibe Mungai**, learned counsel for the Company, submitted that the instant application is misconceived and premature as the applicant seeks substantive orders against the Company yet he has sued the Company as a Nominal Respondent and his fellow shareholder as the respondent. Counsel submitted that a shareholder is not capable of removing a director from the Company's Board as that is the preserve of the General Meeting of the Company.

49. Counsel submitted that the court should not interfere with the organs of the Company in the discharge their mandate and should not encourage the applicant to hold the Company hostage. Counsel noted that the applicant had already placed public notices on the Local Dailies and sent letters to the Companies bankers warning the general public and the said banks not to deal with the company without his approval.

50. Counsel submitted that the applicant cannot come to court to stop a regular process of removal of a Director who has gone rogue.

Analysis and determination

51. I have carefully considered the pleadings filed herein, the submissions made by the parties' respective counsel together with the authorities that they cited. The main issue for determination is whether the applicant has made out a case for granting of the orders sought in the application dated 10th December 2019. Considering that the application has already been heard and that interim orders were issued pending the said hearing, I find that prayer No. 2 of the application is already spent.

52. In prayer No. 4 of the application, the applicant basically seeks orders to restrain the respondent and Nominal respondent from removing, subverting, obstructing, prejudicing, discussing any petition for his removal from the Board of Directors of the Company or in any manner whatsoever interfering with his position and standing as Founder and Executive Director of Boar of Directors of the Company pending the hearing and determination of the suit.

53. The first question that this court must address is whether the application meets the requirements for the granting of orders of injunction which were stated in **Giella v Cassman Brown Company Ltd** [1973] EA 358 to be as follows:

a) An Applicant must show a prima facie case with a probability of success.

b) An Interlocutory Injunction will not normally be granted unless the Applicant might otherwise suffer irreparable loss which would not be adequately be compensated by an award of damages.

c) If the Court is in doubt, it will decide an application on the balance of convenience.

Prima facie case

54. In **Mrao Ltd v First American Bank of Kenya Ltd** [2003] eKLR, the Court of Appeal gave this determination on what amounts to a prima facie case:-

"...In civil cases, it is a case in which, on the material presented to the court a tribunal properly directing itself will conclude that there exist a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

55. The question which then arises is whether the Plaintiff made out prima facie case with a probability of success? The answer thereof will require a relook into the plaintiff's/applicant's case as set out in the pleadings. The applicant's case is that he has overwhelmingly shown that the respondent is relying on her majority shareholding status to threaten to act oppressively and unfairly against him by seeking to remove

him from the Company's Board.

56. The applicant highlighted the unfairly prejudicial and oppressive conduct of the respondent include, unilateral incremental of the facility held with NCBA Bank, refusal to review Director's liability insurance cover, setting him up for removal on illegal and unsubstantial claims, setting him up for insubordination and erosion of his equity through artificial cash calls.

57. On her part, the respondent denied all the allegations made by the applicant and stated that it is the applicant's own unbecoming conduct that necessitated the filing of petition for his removal by the affected shareholders. She maintained that the removal of a director is not within her mandate but fell in the docket of the General meeting of the Company. The Nominal Respondent argued that application is premature and misconceived as the Board of Directors was yet to deliberate on the petition for the applicant's removal and that the court could not be called upon to stop the company from carrying out its mandate in accordance with the law.

58. Looking at the general overview of the applicant's case and bearing in mind the fact that at this early stage in the proceedings the court needs to be cautious not to make any final determination on the issues that must be left to the trial court, it would seem that the applicant's main grievances stem from his fall out with a co-director/shareholder whom she accuses of using her majority shareholding status to undermine him.

59. Section 780 of The Companies Act stipulates as follows:-

(1) A member of a company may apply to the Court by application for an order under [section 782](#) on the ground—

(a) that the company's affairs are being or have been conducted in a manner that is oppressive or is unfairly prejudicial to the interests of members generally or of some part of its members (including the applicant); or

(b) that an actual or proposed act or omission of the company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.

(2) In this section, "member", in relation to a company, includes a person who is not a member of the company but is a person to whom shares of the company—

(a) have been transferred; or

(b) have been transmitted by operation of law.

60. I will now turn to consider the provisions of Sections 781, 782 and 783 which are as follows:-

781.(1) This section applies to a company in respect of which—

(a) the Attorney General has received an inspector's report under Part XXX;

(b) the Attorney General has exercised the powers under [section 1000](#) or 1001;--

(c) the Capital Markets Authority or an officer authorised by it has exercised a power conferred by section 13 or 13A of the Capital Markets Act (Cap. 485A) to obtain information or to carry out an inquiry; or

(d) the Capital Markets Authority has received a report from an officer authorised to carry out an inquiry under section 13A of that Act.

(2) The Attorney General may make an application for an order under [section 782](#) if satisfied—

(a) that the affairs of a company to which this section applies are being, or have been, conducted in a manner that is oppressive or is unfairly prejudicial to the interests of its members generally or to a section of its members; or

(b) that an actual or proposed act or omission of such a company (including an act or omission on its behalf) is or would be oppressive or so prejudicial.

(3) The Attorney General may make such an application in addition to, or instead of, making an application for the liquidation of the company.

782.(1) If, on the hearing of an application made in relation to a company under [section 780](#) or 781, the Court finds the grounds on which the application is made to be substantiated, it may make such orders in respect of the company as it considers appropriate for giving relief in respect of the matters complained of.-

(2) In making such an order, the Court may do all or any of the following:

(a) regulate the conduct of the affairs of the company in the future;

(b) require the company—

(i) to refrain from doing or continuing an act complained of; or

(ii) to do an act that the applicant has complained it has omitted to do;

(c) authorise civil proceedings to be brought in the name and on behalf of the company by such person or persons and on such terms as the Court directs;

(d) require the company not to make any, or any specified, alterations in its articles without the leave of the Court;--

(e) provide for the purchase of the shares of any members of the company by other members or by the company itself and, in the case of a purchase by the company itself, the reduction of the company's capital accordingly.

(3) Subsection (2) does not limit the general effect of subsection (1).

(4) The company is entitled to be served with a copy of the application and to appear and be heard as respondent at the hearing of the application.-

783.(1) If an order of the Court made under [section 782](#)—

(a) alters the company's constitution; or

(b) authorises or directs the company to make any, or any specified, alterations to its constitution, the company shall, within fourteen days after the making of the order or such extended period as the Court may allow, lodge for registration with the Registrar a copy of the order.

(2) If a company fails to comply with subsection (1), the company, and each officer of the company who is in default, commits an offence and on conviction is liable to a fine not exceeding two hundred thousand shillings.---

(3) If, after a company or any of its officers has been convicted of an offence under subsection (2), the company continues to fail to lodge the copy referred to in subsection (1), the company, and each officer of the company who is in default, commit a further offence on each day on which the failure continues and on conviction are each liable to a fine not exceeding twenty thousand shillings for each such offence.

61. A reading of the above cited provisions as a whole shows that the two persons entitled to apply for protection against oppressive conduct and unfair prejudice to interests of members of a Company generally or to a section thereof are a member of a Company or the Attorney General. Under Section 780(2) a member includes a person (though not a member) to whom shares of a Company have been transferred or have been transmitted by operation of law.

62. Section 92 of the Act provides how persons become members of the Company as follows:-

(1) The subscribers to the memorandum and articles become members of the company on the registration of the company.

(2) As soon as practicable after the registration of the company, it shall enter in its register of members the names and addresses of persons who subscribed to its memorandum and the date on which they became members of the company.

(3) Any other person who later agrees to become a member of a company becomes a member of the company when the person's name is entered into the register of members.

63. My understanding of the provisions of Section 780 of the Act are that when a member of Company moves Court for relief under those provisions, the member does so in his/her capacity as member, that is, as member qua member.

64. In the present case, the applicant states that he is a minority shareholder in the Nominal Respondent. He basically seeks order to restrain the respondent who is the majority shareholder from removing, subverting, obstructing, prejudicing or in any other manner whatsoever interfering with his position and standing as Founder and Executive Director in the Board of Directors of Space and Style Limited.

65. The respondent's position and indeed the case of the Nominal respondent is that the position of Founder and Executive Director did not exist in the Company. My finding is that in view of the respondent's denial of the applicant's claim that he was the Founder and Executive Director in the Nominal Respondent, the applicant was required to demonstrate to this court that he indeed occupied the said position. I however note that no material was placed before this court to prove this fact. Be that as it may and even assuming, for argument's sake that the applicant indeed held the position of the executive director, this court is of the considered view that it would not be in a position to stop the Nominal Respondent from removing its Executive Director if the company considers his that such removal is necessary and abides with the requisite legal procedures governing the removal.

66. Courts have taken the position that they will not interfere with the internal affairs or management of companies. This was the position taken in the celebrated case of *Foss v Harbottle (1843) 2 Hare 261* wherein it was stated that courts will interfere only where the act complained of is ultra vires, or is fraudulent or not rectifiable by an ordinary resolution. In the instant case, I find that the matters complained

of do not border on fraud or ultra vires but are such that they can be resolved by the company itself.

67. Furthermore, the removal of an executive director falls within the mandate of the company's Board of Directors and this court is therefore at a loss as to how injunctive orders directed to the respondent in her capacity as a director of the company will stop the BOD from executing its mandate of removing the applicant if such removal is warranted.

68. For the above reasons, this Court takes the view, that on the material before it this far, the applicant has not made out a prima facie case with a probability of success. In the circumstances, I do not have to consider the other conditions for granting orders of injunction as set out in the *Giella* case (supra).

69. The Applicant also pleads that the Respondent, as majority shareholders, has conducted the affairs of the Company in a manner that is oppressive to him as a minority shareholder. In line the provisions of Section 780 of the Act, which I have already highlighted in this ruling, this would be a matter for investigation so that the claims of unilateral incremental of the bank facility, cancellation of the applicant's credit cards, renewal of director's liability insurance cover and fraudulent signing of minutes can be scrutinized. Unfortunately for the Applicant, he has not provided sufficient evidence to back those allegations.

70. Taking into account previous proceedings between the parties herein including the proceedings before the Court of Appeal over the same subject matter where contempt of court proceedings have been initiated against the applicant, this court cannot help but arrive at the conclusion that the instant application is retaliatory in nature going by the bad blood existing between the parties herein. My take is that it would have been appropriate for the parties to pursue one course of action so as not to crowd the court with numerous applications over the same subject matter, an act that can be construed to be an abuse of the court's process.

71. In conclusion I find that the application dated 10th December 2019 lacks merit and it is hereby dismissed with costs. Consequently, the interim orders issued on 13th December, 2019 are hereby vacated.

Dated, signed and delivered via skype at Nairobi this 29th day of April 2020 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of:

Mr. Miano for Kibe Mungai for Nominal respondent

Mr. Miano holding brief Chenge for respondent

Respondent present in person.

C/A & DR – Hon. Tanui